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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-341

CLARENCE FIRSTENBERG,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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COURT OF APPEALS
FOR THE NINTH CIRCUIT

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1. This petition is filed from a judgment of the California Court of Appeal, Second Appellate District, Division 5 which is entitled in the Court of Appeal People v. Clarence Firstenberg, 2d Crim. 33892, and is published in the official California Appellate Reports at 92 Cal. App. 3d 570. The Court filed its opinion on May 1, 1979. A Petition for Rehearing was filed in the Court of Appeal on May 14, 1979, and was denied on May

17, 1979. Pursuant to Rule 24(a) of the California Rules of Court, the decision of the Court of Appeal became final on May 31, 1979. On June 11, 1979, a Petition for Hearing was filed in the California Supreme Court and it was denied on July 25, 1979. This Court has jurisdiction over this case by reason of the provisions of 28 U.S.C. 1257(3) in that this case presents the question as to whether a state statute is valid because it is "repugnant to the Constitution...of the United States..."

2. The question presented for review is whether the California statutes and regulation authorizing warrantless searches of cancelled checks of a skilled nursing home operated by a sole proprietor which are unrelated to patient health, care, and safety are overbroad in that they are not carefully limited in time, place, and scope. United States v. Biswell, 406 U.S. 311, at 315.

3. There are two constitutional provisions involved in the present case. The first constitutional provision is the Fourth Amendment of the United States Constitution which provides:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to

be seized."

Also, this case involves the application of the Fourteenth Amendment to the United States Constitution which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

4. Petitioner was convicted of one count of a violation of California Health and Safety Code section 1290 in that he violated a regulation promulgated by the California State Department of Health (Title 22, California Administrative Code, section 72557) which prohibits the proprietor of a skilled nursing home from comingling patients' trust funds. On December 24, 1976, Petitioner was sentenced to serve ninety days in county jail and pay a $500.00 fine. The case was heard in the Court which normally hears misdemeanor appeals, the Appellate Department of the Los Angeles County Superior Court, and that Court reversed his conviction. Pursuant to Rule 62(a) of the California Rules of Court, the Court of Appeal, Second Appellate District,

Division 5, vacated the Superior Court opinion and ordered the matter transferred. That Court affirmed the judgment in all respects relevant to this petition. The issue presented in this petition and decided by the California Court of Appeal involved the propriety of a warrantless search of cancelled checks and trust account ledgers. Frank Batchkoff, a surveyor for the Los Angeles County Department of Health Services, had the responsibility for inspecting health facilities for the State of California. During February of 1976 he visited the Lincoln Care Center, a skilled nursing facility owned by Petitioner, to verify compliance with State Department of Health regulations. While reviewing the records, Mr. Batchkoff who had no search warrant discovered that a check for $4,000.00 had been drawn on the patients' trust account and deposited in the payroll account of an entity entitled The Diversified Company. A second check had been drawn on the patients' trust account in the amount of $15,000.00 and deposited in the Lincoln Care Center payroll account. Mr. Batchkoff made copies of the two checks. Based upon this information a search warrant was obtained and a further search was conducted. Prior to trial, Petitioner made a motion to suppress evidence pursuant to California Penal Code section 1538.5. The motion to suppress was denied and, after a jury trial, Petitioner was convicted as previously mentioned. The question of the propriety of the search was raised prior to trial at the hearing on the motion to suppress pursuant to California Penal Code section 1538.5, in the Appellate Department of Los Angeles

County Superior Court, the California Court of Appeal, and the California Supreme Court. The issue as to the propriety of the initial search which discovered the checks was raised in the trial court by the motion to suppress, in the Appellate Department of Los Angeles Superior Court, by presenting the issue in the Appellant's Opening Brief, the Appellant's Reply Brief, and the Appellant's supplemental briefs, in the California Court of Appeal by raising it in various Appellant's supplemental briefs and the Petition for Rehearing, and in the California Supreme Court by the filing of the Petition for Hearing. In the Court of first instance, the motion to suppress was denied; in the Appellate Department of Los Angeles Superior Court, the Court reversed the conviction because of the illegality of the initial search and seizure of the checks; in the California Court of Appeal, the conviction was affirmed and the Court held that the search was proper; and in the California Supreme Court the Court refused to grant a hearing and gave no reasons for its order. Because the decision of the California Court of Appeal was a decision on a federal question of substance not heretofore determined by this Court and the decision was decided in a way probably not in accord with the applicable decisions of this Court, pursuant to Rule 19(1) of the Rules of the United States Supreme Court, this Court ought to issue its Writ of Certiorari.

5. The original search by Mr. Batchkoff was clearly improper. Various provisions of the California Health and Safety Code and Title 22

of the California Administrative Code provide that it is not necessary that a warrant be used when searching the records of a skilled nursing facility. This is true even though the skilled nursing facility operates as a sole proprietorship. There are three statutory provisions and one regulatory provision which make it a crime not to consent to a warrantless search of a skilled nursing facility. California Health and Safety Code section 1278 states,

> "Any officer, employee, or agent of the State Department may come upon presentation of proper identification, enter and inspect any building or premises at any reasonable time to secure compliance with, or to prevent a violation of, any provisions of this chapter."

Also, California Health and Safety Code section 1421(a) provides,

> "Any dutifully authorized officer, employee, or agent of the State Department may enter and inspect any long term helath care facility, including, but not limited to, entering a residence and reviewing records, at any time to enforce any provision of this chapter."

The third statute which compels consent to a search is California Health and Safety Code section 1431 which provides:

"It is a misdemeanor for any person to to do any of the following: (a) Willfully prevent, interfere with, or attempt to impede in any way the work of any duly authorized representative of the State Department in the lawful enforcement of any provision of this chapter. (b) Willfully prevent or attempt to prevent any such representative from examining any relevant books or records in the conduct of his official duties under this chapter. (c) Willfully prevent or interfere with any such representative in the preserving of evidence of any violation of any of the provisions of this chapter or of the rules and regulations promulgated under this chapter."

Finally, Title 22, California Administrative Code, section 72725 contains two separate grants of authority to conduct warrantless searches. Section 72725(a) states,

"Any duly authorized officer, employee, or agent of the department may enter and inspect any facility, including, but not limited to, interviewing patients and reviewing records at any time."

Subsection (b) provides:

"No licensee or employee of any skilled nursing facility shall:

"(1) Willfully prevent, interfere with or attempt to impede in any way the work of any duly authorized representative of the department in the lawful enforcement of his inspection duties.

"(2) Willfully prevent or attempt to prevent any such representative from examining any relevant books or records in the conduct of his inspection duties.

"(3) Willfully prevent or interfere with any representative in the preserving of evidence of any violation of these regulations."

Clearly, there are four separate grants of authority to conduct warrantless searches.

None of the foregoing statutes or the aforeemtnioned regulations which permit the search of records without a warrant are properly limited in time, place, and scope. At the outset, it is crucial to understand that the Fourth Amendment protections apply to business premises and corporations. G.M. Leasing v. United States, 429 U.S. 338, at 353. The Fourth Amendment also applies to highly regulated businesses which have a long tradition of close and continuous government supervision. United States v. Pugh, 417 F. Supp. 1019, at 1023; United States v. Enserro, 401 F. Supp. 460, at 463. A search of commercial premises without a warrant is generally unreasonable. Camara v. Municipal

Court, 387 U.S. 523, at 528-529; Marshall v. Barlow's, Inc., 436 U.S. 307, at 312. However, there is an exception to the general rule against searches and seizures of business premises without a warrant pursuant to a regulatory statute when the business is one which is highly regulated and has a long tradition of close and continuous government supervision. In Collonade Catering Corp. v. United States, 397 U.S. 72 and United States v. Biswell, 406 U.S. 311, this Court upheld warrantless searches of a liquor establishment for unlawfully bottled alcohol and a gunshop for some sawed-off shotguns. In Marshall v. Barlow's, Inc., supra, at 313, this Court held that there is no reasonable expectation of privacy that could exist for a proprietor over the "stock" of a highly regulated industry. (The search in the present case was for cancelled checks which are not the "stock" of a skilled nursing home.)

However, the right to conduct warrantless searches in highly regulated industries is by no means absolute. In Marshall v. Barlow's, supra, at 321, this Court noted:

> "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute."

The language referring to "privacy guarantees" finds its basis in the holding of United States v. Biswell, supra, at 315 where this Court indicated that a regulatory inspection system in a closely regulated industry is appropriate only when the

inspection statutes are "carefully limited in time, place, and scope." In Marshall, this Court further emphasized the importance of carefully delineating the scope of a search for records. In footnote 22 of this Court's opinion it was held:

> "Delineating the scope of a search with some care is particularly important where documents are involved. Section 8(c) of the act, 29 U.S.C. section 657(c), provides that an employer must 'make, keep and preserve, and make available to the Secretary (of Labor) or the Secretary of Health, Education and Welfare' such records regarding his activities relating to OSHA as the Secretary of Labor may prescribe by regulation as necessary or appropriate for enforcement of the statute or for developing information regarding the causes and prevention of occupational accidents and illnesses. Regulations requiring employers to maintain records of and to make periodic reports on 'work related deaths, injuries and illnesses' are also contemplated, as are rules requiring accurate records of employee exposure to potential toxic materials and harmful physical agents. In describing the scope of the warrantless inspection authorized by the statute, section 8(a) does not expressly include any records among those items or things that may be examined, and section 8(c) merely provides that the employer is to

'make available' his pertinent records and to make periodic reports. The Secretary's regulation 29 CFR section 1903.3 (1977), however, expressly includes among the inspector's powers the authority to 'review records required by the act and regulations published in this chapter, and other records which are directly related to the purposes of the inspection.' Further, section 1903.7 requires inspectors to indicate generally 'the records specified in section 1903.3 which they will wish to review' but 'such designations of records shall not preclude access to additional records specified in section 1903.3' It is the Secretary's position, which we reject, than an inspection of documents of this scope may be affected without a warrant."

Marshall v. Barlow's, Inc., supra, at 324.

It is the absence of a limitation on warrantless searches of skilled nursing home business records which are unrelated to patient care and safety which constitute the shoals upon which the California statutes and regulation have run aground constitutionally.

Because the California statutes and regulation authorizing searches of skilled nursing home business records are not "carefully limited in time, place and scope" (United States v. Biswell, supra, at 315) and do not comply with this Court's holding in footnote 22 of Marshall v. Barlow's

Inc., supra, at 324, the statutes and regulation are clearly unconstitutional. California Health and Safety Code section 1278 contains no limitation on which records may be searched without a warrant. At least the OSHA regulations condemned in footnote 22 of Marshall v. Barlow's, Inc. had some inherent limitation. In fact, section 1278 permits a search of "any building or premises" which on its face would hardly be limited in "place." In any event, California Health and Safety Code section 1421(a) contains no significant limitation on what records may be reviewed. Section 1421 permits the review of any records "at any time." Such a grant of authority to search without a warrant is neither limited in scope, nor is it limited in time. Moreover, California Health and Safety Code section 1431 which makes it a crime punishable by six months in custody to prevent an examination of "any relevant books or records." This too is hardly a statute which is carefully limited in time, place, or scope. Also, the regulation contained in Title 22 California Administrative Code section 72725 is likewise not limited in time, place, or scope. More critically, each of the foregoing statutes and regulation are just as overly broad as the regulations permitting searches of records by OSHA inspectors as was condemned in footnote 22 of this Court's opinion in Marshall v. Barlow's, Inc., supra, at 324. The California statutes and regulation constitute an unbridled grant of power to conduct searches without warrants of records which are not related to the health, safety, and care of nursing home patients. The decision of the California Court of Appeal, an opinion which

is binding upon all of the trial courts in the most populous state in the republic, constitutes the grant of unrestricted power to conduct searches in highly regulated industries. No Appellate Court opinion since Camara and See v. Seattle, 387 U.S. 541 have upheld statutes or regulations permitting inspection of a sole proprietor's business records which are as unlimited in their scope as the ones in the present case. Because this Court has not heretofore directly decided the substantial question presented by the statutes authorizing warrantless searches of records as are present in the instant case and because the California Court of Appeal has decided the issue in a way not in accord with the applicable decisions of this Court, it is altogether fitting and appropriate that this Court issue its Writ of Certiorari. Rule 19(1)(a), Rules of the United States Supreme Court.

Respectfully submitted,

PAUL ARTHUR TURNER

Attorney for Petitioner
CLARENCE FIRSTENBERG

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	2d Crim. No. 33892
	)	
	)	(L.A.S.C. No.
Plaintiff and Respondent,	)	CR-A15964 Muni.
	)	Ct. L.A. Judicial
vs.	)	Dist. No. 31550806)
	)	
CLARENCE FIRSTENBERG,	)	Court of Appeal -
	)	Second District
Defendant and Appellant.	)	FILED
	)	MAY 1 - 1979
	)	Clay Robbins, Jr.
		Clerk
		Deputy Clerk

APPEAL from a judgment of the Municipal Court of Los Angeles County. Allen Campbell, Judge. Affirmed with directions.

Donald R. Wager and Paul Arthur Turner, for Defendant and Appellant.

Burt Pines, City Attorney, Jack L. Brown, Deputy City Attorney, for Plaintiff and Respondent.

George Deukmejian, Attorney General, James E. Ryan and Donald A Robinson, Deputy Attorneys General, for amicus curiae Department of Health Services, State of California.

John K. Van De Kamp, District Attorney, Donald J. Kaplan, Deputy District Attorney, Edward G. Feldman and Roderick W. Leonard, Deputy District Attorneys, for amicus curiae People of the State of California.

This matter is before us on transfer from the appellate department of the Los Angeles County Superior Court, pursuant to Rule 62(a) of the California Rules of Court. We ordered transfer to consider the constitutionality of a warrantless health department inspection of the business records of a licensed nursing home.

Appellant was the licensee of Lincoln Care Center (Lincoln), a skilled nursing facility within the meaning of Health and Safety Code, section 1250. He was convicted, following a jury trial, of violating Health and Safety Code, section 1290[1]/

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1. Health and Safety Code, section 1290, provides:

"Any person who violates any of the provisions of this chapter or who willfully

(cont. p. A-3)

by comingling patients' funds with his own which, in turn, is a violation of Title 22, California Administrative Code, section 72557.[2] On December 24, 1976, appellant was sentenced to serve 90 days in county jail and to pay a $500 fine. He initially posted bail on appeal, but on December 16, 1977, bail was exonerated and he was released on his own recognizance. The

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1. (cont.)
or repeatedly violates any rule or regulation promulgated under this chapter is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars ($500) or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment.

2. Title 22, California Administrative Code, section 72557, provides, in pertinent part:

"Safeguards for Patients' Monies and Valuables. (a) Each facility to whom a patient's money or valuables have been entrusted shall comply with the following:

"(1) No licensee shall use patients' monies or valuables as his own or mingle them with his own. Patients' monies and valuables shall be separated and intact and free from any liability that the licensee incurs in the use of his own or the institution's funds and valuables. . . ."

matter has meanwhile wended its way through an appeal in the appellate department of the Los Angeles County Superior Court and a rehearing in that court following the decision of the United States Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307, 56 L. Ed. 2d 305, before being transferred here.

The facts of the case are quite simple. The evidence regarding the inspection was as follows: Frank Batchkoff, a surveyor for the Los Angeles County Department of Health Services, had responsibility for inspecting health facilities for the State of California. (Health & Saf. Code, § 1257.) During February 1976 he visited Lincoln to verify compliance with Health and Safety Code regulations. While reviewing Lincoln's records, he discovered that a check for $4,000 had been drawn on the patients' trust account and deposited in the payroll account of an entity denominated Diversified Company. A second check had been drawn on the patients' trust account in the amount of $15,000 and deposited in the Lincoln payroll account. The administrator of the facility permitted Batchkoff to make copies of the two checks. Based upon this information a warrant was obtained and a further search was conducted. Appellant made an unsuccessful motion to suppress on the ground that Batchkoff's initial inspection was made without a warrant and that it could not be validated by the consent of the Lincoln administrator because section 1431 of the Health and Safety Code, by making the refusal to permit inspection

a criminal offense,[3] precludes any consent from being voluntary.

At trial, the following evidence was adduced: Ernest Delphin, Lincoln's bookkeeper, testified that on August 5, 1975, he told appellant that there were insufficient funds in the Lincoln payroll account to meet the payroll. Appellant told Delphin to transfer funds from the patients' trust

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3. Health and Safety Code, section 1431, provides:

"It is a misdemeanor for any person to do any of the following:

"(a) Willfully prevent, interfere with, or attempt to impede in any way the work of any duly authorized representative of the state department in the lawful enforcement of any provision of this chapter.

"(b) Willfully prevent or attempt to prevent any such representative from examing any relevant books or records in the conduct of his official duties under this chapter.

"(c) Willfully prevent or interfere with any such representative in the preserving of evidence of any violation of any of the provisions of this chapter or of the rules and regulations promulgated under this chapter."

account to the payroll account. Delphin at first prepared a single check for $19,000, but appelland directed him to prepare two separate checks, one for $15,000 payable to the Lincoln payroll account and one for $4,000 payable to the Diversified Company payroll account. The Diversified Company account was used to pay management personnel and department heads at Lincoln. The patients' trust account was the repository for patients' funds (social security checks, family gifts, etc.).

It was stipulated that appellant signed the two checks drawn on the patients' trust account. An employee of the Bank of America testified that appellant was also the signator on the Lincoln and Diversified Company payroll accounts. On September 26, 1975, a redeposit of $19,000 was made to the patients' trust account.

Appellant's initial contention on appeal is that a warrantless search of helath care facilities, such as his own, for purposes of securing compliance with licensing regulations is violative of constitutional guarantees of privacy and that such a conclusion is mandated by Marshall v. Barlow's, Inc., supra, 436 U.S. 307, 56 L. Ed. 2d 305.

In Marshall, the Supreme Court invalidated warrantless inspection provisions (29 U.S.C. § 657(a)) of the Occupational Safety and Health Act of 1970 (OSHA). Although, from appellant's point of view, the inspections conducted under OSHA may seem analogous to that conducted in the instant case, the two situations are not

equivalent. Appellant's reliance on Marshall is misplaced. A brief history of the cases dealing with the permissible scope of administrative searches is necessary to place appellant's case in its proper context.

The validity of warrantless administrative searches was first considered by the United States Supreme Court in Frank v. Maryland, 359 U.S. 360, 3 L.Ed.2d 877, where, in a five-to-four decision, the court upheld the conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his residence without a warrant. In Eaton v. Price, 364 U.S. 263, 4 L.2d. 2d 1708, a similar result was reached by an equally divided court. In 1966, the court again examined the issue. (Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed.2d 930.) In the interim, government at all levels had resorted to the increased use of such inspections, while the Supreme Court in cases such as Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, and Ker v. California, 374 U.S. 23, 10 L. Ed. 2d 226, had refined and expanded its concept of the protection afforded by the Fourth and Fourteenth Amendments to the United States Constitution. (Camara v. Municipal Court, supra, 387 U.S. 523, 525.) In Camara, after thoroughly reviewing the scope and purpose of administrative inspections and the nature and extent of the intrusion upon the right to privacy which they presented, the court, by a six-to-three vote, overruled Frank and held that warrantless administrative searches for the purpose of securing compliance with a municipal housing

code violated the Fourth Amendment guarantee of privacy. (387 U.S. at p. 534.)

In a companion case, See v. City of Seattle, 387 U.S. 541, 18 L. Ed. 2d 943, involving a routine inspection to secure compliance with the municipal fire code, the court extended the protection of the Fourth Amendment to administrative searches of portions of commercial premises not open to the public. See circumscribed its own scope, however, with the following proviso:

> "We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard or reasonableness. . . . ." (387 U.S. at pp. 545-546.)

The Supreme Court commenced its post-See case-by-case review of regulatory inspections of licensed industries in Colonnade Corp. v. United States, 397 U.S. 72, 25 L. Ed. 2d 60. There it reviewed a statute providing for warrantless inspection of the merchandise and business records[4] of liquor licensees. Focusing upon

4. See p. A-9.

the lengthy history of government regulation of the liquor industry, dating back to colonial times, the court held that such "searches" met the Fourth Amendment test of reasonableness.

In United States v. Biswell, 406 U.S. 311, 32 L. Ed. 2d 87, the court reviewed a statute calling for inspection of the stock and records of licensed firearms dealers. It noted that there was not the same deep-rooted history of regulation in the firearms industry as there was in the liquor industry. It upheld the statute nonetheless, essentially on two theories. After first finding that the federal government had a legitimate interest in regulating interstate traffic in firearms, the court further found that in order to be effective, inspections to secure compliance with licensing regulations had to be frequent and unannounced, thus rendering warrantless inspections both necessary to the regulatory scheme and reasonable under the Fourth Amendment. The court contrasted the factual setting in Biswell from that in See where building code violations were difficult to conceal or to correct in a short time so that requiring that inspections be made pursuant to warrant did not jeopardize effective enforcement of the ordinance.

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4. The statute (26 U.S.C. § 5146(b)) called for inspection of "any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto . . . ." (Colonnade Corp. v. United States, supra, 397 U.S. 72, 73, fn. 1.)

The second basis upon which the statute in Biswell was upheld was the court's conclusion that the inspections which it provided for posed only a limited threat to the firearms dealer's "justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. 18 U.S.C. § 921(a)(19). The dealer is not left to wonder about the purposes of the inspector ot the limits of his task. (Par.) We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute. . . ." (406 U.S. at pp. 316-317.)

Marshall v. Barlow's, Inc., supra, unlike Colonnade and Biswell, dealt not with a regulatory scheme for a particular licensed industry, but with a statute which applies to all businesses engaged in interstate commerce. (29 U.S.C. §§ 652, 654.) Marshall in no way curtailed the scope of Colonnade and Biswell; in fact, it expressly approved the holding of those cases.

It is thus clear that there are two lines of cases and two sets of rules governing administrative

searches. The first of these deals with general regulatory schemes--whether federal, state, or local--which apply to all residences or all structures or all employers within the particular jurisdiction. Camara and See fall within this category, as does Marshall. The second line of cases involves regulatory legislation governing specific licensed industries. Colonnade and Biswell fall within this category. Appellant's situation falls within this second line of cases and must be evaluated accordingly.

The State of New York has upheld a statute authorizing warrantless inspections of licensed nursing homes upon the rationale of Biswell. (Uzzillia v. Commissioner of Health, 367 N.Y.S. 2d 795.) In California, the health care industry, while lacking the lengthy history of regulation of the liquor industry cited in Colonnade, is now, and for some years past has been, pervasively regulated.[5] A license is required to operate

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5. Regulation of the health care industry dates back to 1945 when former sections 1400 to 1418 providing for licensing, inspection, regulation and supervision of public and private hospitals were enacted. (Stats. 1945, ch. 1418.) Expansion and revision of the pertinent legislation has continued since that time and has, over the years, involved reorganizing and renumbering of many Health and Safety Code provisions. Provisions for licensing institutions which care for the aged and infirm date back to 1925. (Pol. Code, §§ 2330-2346; Stats. 1925, Ch. 18.)

a skilled nursing facility. (Health & Saf. Code, § 1251.) The licensee of such a facility is subject not only to the regulations contained in Chapter 2 of Division 2, commencing with section 1250, but also to the additional regulations pertaining to "long-term health facilities" contained in Chapter 2.4 of Division 2 of the Health and Safety Code, commencing with section 1417, and to the administrative regulations in Title 22 of the California Administrative Code promulgated in furtherance of the legislative scheme. The licensee is on notice that compliance with the statutes and regulations is a condition of his doing business.

The inspection provisions governing the health care industry are found in section 1278 which provides:

> "Any officer, employee, or agent of the state department may, upon presentation of proper identification, enter and inspect any building or premises at any reasonable time to secure compliance with, or to prevent a violation of, any provision of this chapter."

and in section 1421 which provides:

> "(a) Any duly authorized officer, employee, or agent of the state department may enter and inspect any long-term helath care facility, including, but not limited to, interviewing residents and reviewing records, at any time to enforce any provision of this

chapter. Inspections conducted pursuant to complaints filed with the state department shall be conducted in such a manner as to ensure maximum effectiveness. No advance notice shall be given of any inspection conducted pursuant to this chapter unless previously and specifically authorized by the director or required by federal law.

(b) Any public employee giving such advance notice in violation of this section shall be deemed to be in violation of subdivision (t) of Section 19572 of the Government Code and shall be suspended from all duties without pay for a period determined by the director."

The majority of patients of skilled nursing homes and other long-term health care facilities are, for the most part, not only in need of physical care, but are also incapable of looking after their own financial affairs. In addition to being physically infirm, most are elderly. Many lack family members who can oversee either the physical care they receive or the management of their financial resources. The expenses of many of the patients of such facilities are paid out of public funds. It the state does not assume responsibility for their welfare through the medium of licensing and inspection there is no one else that can or will.[6/] The state's

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6. See p. A-14.

legitimate interest in regulating the industry needs no further elaboration.

As in Biswell, the nature of the industry and of the abuses to which it is subject require that inspections, to eb effective, be both frequent and unannounced. It is, of course, obvious that such inspections are crucial to the effective oversight of the physical wellbeing of patients, to assure that they are not neglected or even abused. Frequent, unannounced inspections are also essential to effective protection of patients' financial welfare.[7/] Financial records can easily be concealed or even falsified. Patients are helpless to protect themselves. Unlike workers who can report OSHA violations, confidentially--or even anonymously

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6. For a more detailed discussion of the physical psychological and financial conditions of most nursing home patients, see "Nursing Homes in California," Assembly Committee on Health, Interim Hearing, November 1977; "Nursing Home Abuses," Hearings Before the Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, House of Representatives, 95th Congress, 1st Session; "Nursing Home Care in the United States: Failure of Public Policy, Supporting Paper No. 7, "Subcommittee on Long-Term Care of the U.S. Senate Special Committee on Aging, March 1976.

7. As noted, the statutes in both Colonnade and Biswell called for inspections of business records.

if they are concerned about job security-most nursing home patients are neither aware of, nor capable of protesting, misuse of their funds. The knowledge that records can be examined without prior notice is the surest guarantee that nursing home licensees will fulfill their fiduciary responsibilities toward their patients. Such inspections are also the most effective method of assuring that thos who fail to fulfill these responsibilities are identified so that their conduct can be corrected or their licenses revoked. The necessity for unannounced warrantless inspections in the long-term health care industry is just as great as in the firearms industry and such inspections are, therefore, reasonable within the meaning of the Fourth Amendment.

As for appellant's further contention that section 1431[8/] precludes there being a voluntary consent to a warrantless inspection, as far back as 1968, it was held that there is ". . . a fundamental premise that acceptance of a license to operate a hospita is an implied consent to such supervision and inspection as is required by the licensing statute involved." (People v. White, 259 Cal. App. 2d Supp. 936.) In Marshall, too, the court cited the implied consent of a businessman in a regulated industry to the restrictions placed upon him. (Marshall v. Barlow's, Inc., supra, 436 U.S. at p. 313.) In Biswell, however, the court analyzed the situation differently:

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8. See footnote 3 ante.

"When the officers asked to inspect respondent's locked storeroom, they were merely asserting their statutory right, and respondent was on notice as to their identity and the legal basis for their action. Respondent's submission to lawful authority and his decision to step aside and permit the inspection rather than face a criminal prosecution [footnote omitted] is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry. In either case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all. . . . In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute." (United States v. Biswell, supra, 406 U.S. at pp. 314-315.)[9/] (Emphasis in original.)

Regardless of whether the justification advanced is the legal fiction of implied consent as in White, or Biswell's judicial circumscription

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9. The federal statute also made it a crime to refuse to allow inspection.

on what expectations of privacy are reasonable for a business licensee, the end result is the same. Acceptance of the license carries with it the burden of submission to inspections which reasonably further enforcement of the regulatory scheme.

Appellant argues that the Health and Safety Code inspection provisions do not meet the test of reasonableness set forth in Biswell because they are not "carefully limited in time, place, and scope." (406 U.S. at p. 315.) Section 1278 provides that entry may be made "at any reasonable time." Inspection may be made "to secure compliance with, or to prevent a violation of, any provision of . . . [chapter 2]." Entry is limited to officers, employees, or agents of the state department of health, and only upon presentation of proper identification. Although section 1278 refers to inspection of "any building or premises" it is clear from the context in which these words are used that the statute is in fact talking about any licensed building or premises. Section 1278 is sufficiently circumscribed as to time, place, and scope to pass constitutional muster.

Section 1421 also limits entry to officers, employees, and agents of the state department. The purpose of entry is limited to enforcement of provisions of chapter 2.4. Long-term health care facilities are expressly designated as the premises to be inspected. Section 1421 differs from section 1278 in two respects: it expressly authorizes review of the facility's records rather than just its premises; and it authorizes entry "at any time." Appellant argues that this latter

provision renders section 1421 overly broad and that since section 1278 does not provide for inspection of records, there is no valid statute authorizing the search which Batchkoff made. Typically, inspection statutes call for entry during business hours. (United States v. Biswell supra, 406 U.S. 311; 18 U.S.C. § 923(g); Colonnade Corp. v. United States, supra, 397 U.S. 72; 26 U.S.C. § 5146(b).) Long-term health care facilities, by statutory definition (Health & Safety Code, § 1418), provide 24-hour skilled nursing services. They have no business hours per se. Within this industry, a provision for inspection at any time is not only reasonable, it is essential to successful enforcement of the regulatory provisions.

Although an inspection of business records in the dead of night might prove to be unreasonable, the statute on its face is not. Since inspections to enforce licensing provisions form an exception to the Fourth Amendment requirement that warrants be obtained, a showing that inspection was made pursuant to such a statute is sufficient to place the burden of proof on the defendant to show that a particular search was conducted in an unreasonable manner. There was no showing in the present case that Batchkoff's inspection occurred during anything other than normal daytime business hours. Thus there was no showing that the inspection was in any way unreasonable.

Appellant nexts contends, constitutional considerations aside, California statutorily

provides for issuance of administrative inspection warrants (Code Civ. Proc., § 1822.50.)[10] and that issuance of such a warrant is therefore a precondition to conducting all administrative inspections. The history set forth above of the development of the body of law governing administrative searches makes it patently clear that Code of Civil Procedure, section 1822.50, was intended to comply with the rule enunciated in Camara, supra, and See, supra, and is applicable only to situations falling within the purview of that line of cases. Code of Civil Procedure, section 1822.50, has no applicability to inspections of licensed businesses which are governed by the rules enunciated in Colonnade, supra, and Biswell, supra.

Appellant next contends that the Legislature did not delegate to the Department of Health the authority to make comingling a crime, that it, therefore, was without jurisdiction to adopt 22 California Administrative Code, section 72557.

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10. Code of Civil Procedure, section 1822.50 provides:

"An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, or zoning."

Appellant concedes that: "The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect, and provision by the Legislature that such rules and regulations shall have the force, effect, and sanction of law does not violate the constitutional inhibition against delegating the legislative function. [Citations.]" (First Industrial Loan Co. v. Daugherty, 26 Cal. 2d 545, 549.) The power to adopt rules and regulations to effectuate legislative policy with respect to the health care industry is conferred upon the State Department of Public Health by Health and Safety Code section 1222. The Legislature has retained unto itself, however, the power of declaring the penalty for violation of such rules and regulations. (Health & Saf. Code, § 1290) The delegation of power to the department is, therefore, constitutionally valid. (People ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 496.) Appellant makes no showing that the regulation prohibiting comingling is not reasonably calculated to further the general regulatory policy set forth by the Legislature. The mere fact that restrictions against comingling are imposed on other professions (e.g., real estate brokers and escrow companies) by way of statute (Bus. & Prof. Code, §§ 10145, 10185, 17409, 17444) is immaterial.

There is likewise no merit to appellant's contention that the trial court erred in refusing

to permit evidence or argument as to appellant's possible good-faith belief that he had a right to comingle patients' funds with his own. His theory appears to be that because embezzlement, a more serious offense than comingling, is a specific intent crime, as to which a good-faith claim of title constitutes a defense (Pen. Code, § 511), comingling must also be. The notion that a less serious offense must include all of the elements of a more serious related offense is certainly novel, though unpersuasive. Comingling by a nursing home licensee consists of the licensee's mixing a patient's funds with his own. The danger which such conduct presents is that the patient's funds may be subjected to the claims of the licensee's creditors and ultimately be lost. (Peck v. The State Bar, 217 Cal. 47.) This danger exists regardless of the licensee's good-faith belief in his right to treat the patient's funds in this fashion or of his intention eventually to return them to the patient. The offense requires no greather intent than the licensee's intent to mingle the patient's funds with his own.

Appellant next contends that his conviction must be reversed because the trial court improperly stated that he was guilty. The contention is grounded upon the giving of the following instruction, the italicized portion of which forms the basis for appellant's claim:

> "The fact that I'm submitting this case to you for your verdict shows I have determined as a matter of law that there is sufficient evidence lawfully before you to

> support a verdict that the Defendant is guilty as charged.
>
> "Whether or not you individually reach a decision or verdict of guilty depends upon your individual determination under all of my instructions, of the credibility of the testimony and other evidence that supports the charge, upon your assessment of the weight and value of such evidence, and finally, after your consideration of all of the evidence in this case, upon whether or not you are satisfied beyond a reasonable doubt and to a moral certainty that the Defendant is indeed guilty as charged.
>
> ½If you individually are so satisfied that the Defendant is guilty as charged, then your individual decision and verdict must be that he is guilty.
>
> "If you individually are not so satisfied that the Defendant is guilty as charged, then your individual decision and verdict must be that he is not guilty."

The portion complained of cannot be viewed in isolation. The remainder of the instruction makes clear that the decision as to guilt or innocence rested entirely with the jury. Other instructions given by the trial court reinforced that directive. The error, if any, in giving the italicized portion of the instruction was entirely harmless.

Finally, appellant contends that the sentence imposed upon him was an abuse of discretion both because the trial court acted in the erroneous belief that appellant had not restored all patients' funds to them and because his age and previous unblemished record rendered him an unsuitable candidate for a jail sentence. We need not reach the question of whether the trial court abused its discretion in imposing the sentence it did when it did because we believe that appellant's age,[11] his health as described in the probation report in file, and the fact that he has been free on bail for over two years, indicate the advisability of obtaining a new probation report and holding a new sentencing hearing. At such hearing, the trial court should satisfy itself as to whether restitution is in order or whether patients' funds were fully restored.

The cause is remanded for a new sentencing hearing. In all other respects the judgment is affirmed.

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11. Appellant is presently 73 years old.

CERTIFIED FOR PUBLICATION

ASHBY, J.

We concur:

STEPHENS, ACTING P.J.

HASTINGS, J.

APPENDIX B

MAY 17 1979

Los Angeles, Cal. _____, 19___

TITLE { _____ } No. 33892

PETITION FOR REHEARING DENIED

CLAY ROBBINS, *Clerk*

By _____ Deputy

52449-112 6-77 6M ⓘ◊ OSP

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

I have this day filed Order _____

In re: 2 Crim. *No.* 33892

People

vs.

Firstenberg

Respectfully,

G. E. BISHEL
Clerk

JUL 23 1979

65953-877 11-78 4M (SS)

Supreme Court, U. S.
FILED
NOV 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-341

CLARENCE FIRSTENBERG,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION FIVE

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OPINION BELOW

The opinion of the California Court of Appeal (App.A of Petition) is reported at 92 Cal.App.3d 570.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether California Health and Safety Code sections 1278 and 1421(a), authorizing warrantless inspections of health care facilities, are "carefully limited in time, place, and scope," thereby satisfying the test of reasonableness set forth in United States v. Biswell, 406 U.S. 311, 315.

STATUTES INVOLVED

The pertinent provisions of California Health and Safety Code sections 1278 and 1421 are set forth in the Petition at p.6.

STATEMENT OF THE CASE

Petitioner was the licensee of Lincoln Care Center (Lincoln), a

skilled nursing facility within the meaning of California Health and Safety Code section 1250. He was convicted, following a jury trial, of violating California Health and Safety Code section 1290, an enabling statute which, in conjunction with Title 22, California Administrative Code section 72557, makes it a misdemeanor to comingle patients' funds with ones own.

Evidence of the violation was discovered during February 1976 by Frank Batchkoff, a surveyor for the Los Angeles County Department of Health Services, who had responsibility for inspecting health facilities for the State of California (Health and Safety Code section 1257.) While reviewing Lincoln records, he discovered two checks totalling $19,000 which had been drawn against the patients' trust account and deposited into two payroll accounts. The administrator of the facility allowed Batchkoff to make copies of these checks. Based

upon these checks and the information provided by Batchkoff, a warrant was obtained and a further search was conducted.

ARGUMENT

I

THE DECISION BELOW IS CLEARLY CORRECT AND DOES NOT CONFLICT WITH ANY APPLICABLE DECISION OF THIS COURT

After a careful examination of the record before it, and after thoughtful consideration of the nature of the long-term health care industry and the potential therein for patient abuse, both as to their physical and their financial well being, the Court of Appeal quite properly held that warrantless, unannounced inspections of such health care facilities are reasonable within the meaning of the Fourth Amendment.

In so holding, the Court of Appeal considered the teachings of this court in Colonnade v. United States,

397 U.S. 72, United States v. Biswell, 406 U.S. 311, and Marshall v. Barlow's, 436 U.S. 307.[1/] As required under these cases, the Court examined the history of regulation in the health care industry. Its finding that the industry has had a lengthy history of extensive regulation, dating as far back as 1925, led it to recognize that warrantless inspections of the health care industry were reasonable under the Fourth Amendment. Additionally, as required by Camara v. Municipal Court, supra, at 535, it considered the specific enforcement needs within the nursing home field. Realizing the helplessness that characterizes the average patient in such facilities, the court acknowledged the necessity for frequent and unannounced inspections in order to

1/ Notwithstanding petitioner's suggestion to the contrary, the Court of Appeal also considered and carefully distinguished, the warrantless inspection statutes and their regulatory framework in Camara v. Municipal Court, 387 U.S. 523, and See v. Seattle, 387 U.S. 541.

effectively protect both the patients' physical and financial welfare.

Petitioner, though apparently conceeding the appropriateness of warrantless inspections in the nursing home field, nonetheless argues that the search in his case was unconstitutional. This conclusion, predicated upon his assumption that the warrantless inspection statutesat issue are not carefully limited as to time, place, and scope as required under Biswell, does not address and therefore fails to consider the reasoned analysis of the Court of Appeal.

In concluding that sections 1278 and 1421 were "carefully limited as to time, place, and scope", the Court considered these statutes in the context of the realities of the nursing home industry and the specific enforcement needs therein.

Section 1278 provides that entry may be made "at any reasonable time". Inspection may be made, "to secure compliance with, or to prevent a violation of, any provision of . . .

[Chapter 2]." Though by its terms section 1278 provides that "any building or premises" may be the subject of an inspection, the court considered the context in which these words are used, and concluded that in fact the statute was referring only to any licensed building or premises.

Section 1421 expressly designates long-term health care facilities as the premises to be inspected. It differs from section 1278 in two respects: It expressly authorizes review of the facility's records rather than just its premises; and it authorizes entry "at any time." Though recognizing that inspection statutes typically call for entry during business hours (United States v. Biswell, supra; Colonnade v. United States, supra), because long-term health care facilities by statutory definition (California Health and Safety Code section 1418) provide 24-hour skilled nursing services, the Court concluded that it was not only reasonable, but essential to successful

enforcement of the regulatory provisions that inspections be allowed at any time. Acknowledging that both Biswell and Colonnade dealt with statutes calling for inspections of business record--a point carefully overlooked by petitioner--the Court found that the potential for abuse in the area of patient financial welfare mandated the frequent, unannounced inspection of a facility's business records.

After performing the above analysis, the Court properly concluded that the statutes at issue passed constitutional muster.

CONCLUSION

For the foregoing reasons, the People of the State of California respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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City of Los Angeles
Counsel for Respondent